STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

In re:	)	**1998 OAL Determination No. 33**
Request for Regulatory Determination filed by the COMMUNITY PSYCHIATRIC CENTERS regarding the STATE BOARD OF CONTROL'S policies of requiring hospitals to provide clinical psychiatric histories of crime victims prior to reimbursement for treatment and reducing reimbursement due to pre-existing mental conditions[1]	)	**[Docket No. 93-009]** **November 4, 1998** **Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3**

Determination by: **EDWARD G. HEIDIG, Director**

HERBERT F. BOLZ, Supervising Attorney
CINDY PARKER, Administrative Law Judge
on special assignment
Regulatory Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law ("OAL") is whether the State Board of Control's policies of (1) requiring hospitals to submit the clinical psychiatric histories of crime victims before considering reimbursement for mental health treatment and (2) reducing reimbursement based upon pre-existing mental conditions are "regulations" and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

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OAL has concluded that:

(1) The policy which requires the hospitals to submit the clinical psychiatric histories of crime victims before consideration of requests for reimbursement for mental health treatment are considered is a "regulation."

(2) The policy which allows apportionment and denial of reimbursement of mental health treatment expenses based upon pre-existing mental health conditions is a "regulation."

If the Board wishes to exercise its discretion to issue rules governing this matter, it may adopt regulations pursuant to the APA.

ISSUE

OAL has been requested to determine whether the policies of the State Board of Control (1) requiring hospitals to submit clinical psychiatric histories of crime victims before considering reimbursement to the hospitals and (2) reducing reimbursement based upon pre-existing mental health conditions are "regulations" required to be adopted pursuant to the APA.[2] Irving H. Perluss filed this request on behalf of the Community Psychiatric Centers.

ANALYSIS

I. IS THE APA GENERALLY APPLICABLE TO THE STATE BOARD OF CONTROL'S QUASI-LEGISLATIVE ENACTMENTS?

Created in 1945,[3] the State Board of Control ("Board") is the administrative board responsible for adjudicating monetary claims filed against the State of California.[4] In this capacity the Board reviews and pays claims filed under the Victims of Crime Program. The Victims of Crime Program is designed to "assist residents of the State of California in obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts."[5]

Until 1994[6], Government Code section 13920 provided in part:

"By a majority vote, the board shall adopt general rules and regulations:

> . . . (c) Governing the presentation and audit of claims against the state for which an appropriation has been made or for which a state fund is available. . . ."

The APA applies to all state agencies, except those "in the judicial or legislative departments.[7] Since the Board is in neither the judicial nor the legislative branch of state government, OAL concludes that APA rulemaking requirements generally apply to the Board.[8]

In addition, the Board is made subject to the APA by Government Code section 13968, subdivision (a), which states:

> "The board is hereby *authorized to make all needful rules and regulations consistent with the law* for the purposes of carrying into effect the provisions of this article." (Emphasis added.)[9]

OAL reads the phrase "consistent with the law" to mean (among other things) that rules and regulations adopted under this section must be adopted in conformity with the law governing administrative rulemaking, i.e., the APA.

II. DO THE CHALLENGED RULES CONSTITUTE "REGULATIONS" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every* rule, regulation, order, or standard of general application *or* the amendment, supplement or revision of any such rule, regulation, order or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," and thus subject to APA adoption requirements, provides in part:

"(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. (Emphasis added.)"

In *Grier v. Kizer*,[10] the California Court of Appeal upheld OAL's two-part test[11] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule meets both parts of the two-part test, OAL must conclude that it is a "regulation" and subject to the APA. In applying the two-part test, however, OAL is mindful of the admonition of the *Grier* court:

". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra,* 22 Cal.3d at p. 204, 149 Cal. Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.* (Emphasis added.)"[12]

A. ARE THE CHALLENGED RULES "STANDARDS OF GENERAL APPLICATION?"

Challenged Policies

The requester alleges that the Board has a policy of requiring hospitals which provide mental health treatment to crime victims to provide the clinical psychiatric histories of the victims before reimbursement to the hospitals is considered by the Board.[13] A second alleged policy is that the Board reduces hospital reimbursement based upon a conclusion that part of the treatment provided is due to a pre-existing mental condition.[14]

The Board contends that because the policies are non-binding on the public or the Board, and because the Board will allow the claim if the claimant presents sufficient reliable and credible evidence that inpatient mental health treatment is necessary as a direct result of the crime, the policies do not constitute standards or rules which must be adopted pursuant to the APA.[15]

Government Code section 11340.5 prohibits state agencies from issuing or utilizing "any *guideline, criterion,* . . . standard of general application, or other rule which is a "regulation" as defined in the APA. (Emphasis added.) The Board's policy could be characterized as a guideline for staff in obtaining verification. It is clear that a guideline is one type of policy which the Legislature sought to prohibit in Section 11340.5 insofar as it contains "regulations" which should have been, but were not, adopted pursuant to the APA. OAL will next address whether each policy exists and whether it has general application.

1. Requiring clinical psychiatric histories of victims

In response to the requester's assertion that the Board requires hospitals to provide the clinical psychiatric histories of victims, the Board responded as follows:

> "The Board's longstanding practice is that staff verify requests for payment of inpatient mental health treatment by requesting documentation of the treatment from the hospital. Staff typically request admitting and discharge and treatment notes.[16]

It is unclear from the record before OAL whether the clinical psychiatric histories referred to by the requester include records relating to treatment given before the crime occurred for which the victim is seeking compensation. The word "histories" suggests that the term includes records of treatment which pre-date the crime. It is also unclear to what extent the documents routinely requested by the Board from hospitals which provided post-crime mental health treatment would contain information relating to pre-crime treatment. The Board has acknowledged that it routinely requests verification in the form of admission and discharge records and treatment notes. For purposes of this determination, OAL will assume that the records routinely requested of hospitals seeking reimbursement for mental health treatment may include some information regarding psychiatric histories of the victims. The Board has the statutory authority to decide that the application and attachments do not require additional verification,[17] and it periodically does so. Verification is to be performed before the approval or denial of the victim's claim.[18] As it is undisputed that the Board staff routinely request admission and discharge records and treatment notes, OAL concludes that the Board has a policy which is often, although not always applied, to obtain hospital records of treatment which contain information about the psychiatric histories of the crime victims provided treatment prior to considering reimbursement to the hospitals which provided mental health treatment.

For an agency rule to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[19] The Board policy appears to apply to hospitals throughout the state which seek reimbursement for mental health treatment of crime victims. Therefore, this policy is a standard of general application.

2. Denying payment for mental health services found to be required due to a pre-existing mental health condition

The Board agrees that it considers pre-existing mental health conditions to determine which expenses are "directly related to injuries sustained as a result of the crime and for no other reason."[20] The Board denies having a policy to disallow inpatient mental health treatment if the crime aggravates a pre-existing condition. It admits that:

> "Treatment will be apportioned and the program will reimburse for the portion of the treatment that is necessary as a direct result of the crime when

it is appropriate to do so" in cases where there is a pre-existing mental health condition.[21]

OAL considers this as an acknowledgment that staff are directed to consider apportionment based upon pre-existing mental conditions in making their recommendations to the Board regarding reimbursement.[22]

This policy also appears to apply statewide. Therefore, it is a standard of general application.

Before reaching the dispositive issues of this determination, OAL first clarifies for the requester the scope of our review. This determination does not address the requester's contention that staff without medical training are unqualified to make recommendations that some mental health treatment expenses not be reimbursed because they are due to pre-existing conditions. OAL jurisdiction does not extend to issuing determinations on substantive issues of this kind. OAL review for purposes of determinations is limited.

Upon a request for determination submitted pursuant to Government Code section 11340.5, OAL is required to provide a written determination as to whether the rule challenged by the requester is a "regulation," as defined under the APA. If the challenged rule is determined to be a "regulation," then the agency's failure to adopt the rule under the requirements of the APA renders the rule invalid and unenforceable. OAL review for purposes of determinations is limited, and a contrary finding by OAL, i.e., that the rule is not a "regulation," does not mean that OAL has determined the rule to be legally valid, only that the rule does not meet the statutory definition of "regulation."

B. DO THE CHALLENGED RULES INTERPRET, IMPLEMENT, OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE AGENCY OR GOVERN THE AGENCY'S PROCEDURE?

In 1974, the Legislature adopted Government Code section 13959, also known as "California's Victims of Crime Act." Amended in 1982 and 1983, this statute now provides that:

> "It is in the public interest to assist residents of the State of California in obtaining *restitution for the pecuniary losses they suffer as a direct result of*

criminal acts. This article shall govern the procedure by which crime victims may obtain restitution through compensation from the Restitution Fund." (Emphasis added.)

"Pecuniary loss" is defined as any expense for which the victim has not and will not be reimbursed from any other source.[23]

Until 1993, losses included (1) the amount of medical or medical-related expenses, including psychological or psychiatric expenses,[24] and (2) the amount of mental health counseling related expenses necessary *as a result* of the crime.[25] In 1993, subdivision (d) was amended to state that psychological, psychiatric and mental health counseling expense must have become necessary as a *direct result* of the crime.

Government Code section 13961, subdivision (a), provides that a victim of a crime may file an application for assistance with the State Board of Control. Government Code section 13965, subdivision (a)(5), provides that the total award to or on behalf of the victim shall not exceed twenty-three thousand dollars ($23,000.00).[26]

The Board may verify information *it deems necessary* regarding an application.

> "The verification process shall include sending supplemental forms to all hospitals, physicians, law enforcement officials, and other interested parties involved, verifying the treatment of the victim . . . and other pertinent information as may be deemed necessary by the board. Verification forms shall be provided by the board and shall be returned to the board within 10 business days."
>
> "The board shall include on the verification forms a statement certifying that a signed authorization by the applicant . . . constitutes actual authorization for the release of information . . . . Each request from the board to a physician for a copy or summary of medical records shall include a copy of the signed authorization for the release of information."[27]

Government Code section 13964, subdivision (a), provides that after hearing evidence relevant to the application for assistance, the Board is required to approve the application if a preponderance of the evidence shows that as a direct result of the crime the victim incurred an injury which resulted in a pecuniary loss.

Once an application for assistance is approved, the Board may:

> ". . . authorize a direct cash payment to a provider of psychological or psychiatric treatment or mental health counseling services . . . equal to the pecuniary loss attributable to medical or medical-related expenses, including counseling, *directly resulting from the injury.*[28]

The duly adopted regulations of the Board of Control which relate to the Victims of Crime program are found at sections 649 through 649.72, Title 2, California Code of Regulations ("CCR").

Section 649, subsection (a)(5), requires that an application by a crime victim include the date(s) that medical, mental health or other professional services were provided, a description of the services provided and a statement that the services were received and were required as a *direct result of the crime.*

Section (a)(6) requires an authorization to be signed by the victim permitting the Board or its designee to verify the contents of the regular application.

In addition, applicants seeking payment of mental health expenses must provide an itemized statement from the professional provider for all mental health expenses incurred as of the date of the regular application,[29] and a statement that the mental health services were required as a *direct result of the crime and for no other reason.*[30]

The Board's duly adopted regulations further provide that if verification is requested of a hospital or treatment provider, but is not returned to the Board within ten days, the Board may decide that the additional verification is not necessary.[31]

Taken together, the pertinent statutes and regulations provide that the Board may obtain verification of a claim, including medical records. The Board contends that its policy is merely a restatement of the statute which provides for verification of claims. However, section 13962 of the Government Code allows the Board to seek verification of treatment and to obtain medical records or summaries to verify the claim when the Board deems it necessary or appropriate. The Board policy provides that staff routinely request admission and discharge records and

treatment notes. This is an interpretation of when the Board exercises its discretion to obtain verification records. Therefore, it interprets and makes specific the law governing the Board's procedure.

As to the apportionment of mental health treatment expenses, the Board has the authority to determine which expenses directly result from the injury. The question is whether apportionment and denial of reimbursement for mental health treatment due to a pre-existing mental condition is the only reasonable interpretation of the phrase "direct result of the crime" and "direct result of the crime and for no other reason." The former phrase appears throughout the statutory scheme and duly adopted regulations. The latter phrase appears solely in section 649.9(b)(5) of the duly adopted regulations.

The requester contends, analogizing to the law of torts, that another reasonable interpretation of these words is that all of the detriment resulting from the criminal act is compensable, " . . .even though a pre-existing condition in the injured person made the consequences of the injury more serious than they would have otherwise been."[32]

In *Grier v. Kizer*[33] the Court of Appeal rejected a similar restatement argument by the Department of Health Services. In that case the Department submitted "there was no need to promulgate a regulation because the only legally tenable interpretation of its statutory auditing authority [was] that statistical sampling and extrapolation procedures must be utilized." The Court rejected that argument by finding that other auditing procedures, although perhaps not as feasible or cost effective, existed. Thus, that method was not the only "*tenable*" interpretation of the statute. (Emphasis in original.)

In 1989,[34] OAL rejected a similar argument, while explaining:

> "In general, if the agency does not add to, interpret, or modify the statute, it may legally inform interested parties in writing of the statute and 'its application.' Such an enactment is simply 'administrative' in nature, rather than 'quasi-judicial' or 'quasi-legislative.' If, however, the agency makes new law, i.e., supplements or 'interprets' a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power."

Citing an earlier OAL Determination, OAL went on to explain:

> "If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable 'interpretation,' that rule is not quasi-legislative in nature--no new 'law' is created."[35] [Emphasis added.]

The question is whether the second component of the challenged policy merely restates existing law. The statutes and regulations make numerous references to compensation for injuries directly resulting from the crime. It could be argued that injuries resulting from pre-existing conditions which were aggravated by a crime directly result from the crime.

Likewise, it could reasonably be argued that such injuries are indirect results of the crime. In other words, there is more than one reasonable interpretation of "direct result." The language of section 649.9(b)(5) of the duly adopted regulations is more specific in that it requires that the victim sign a statement that the mental health services were required "as a direct result of the crime and for no other reason." This is also subject to more than one reasonable interpretation. The phrase could mean injuries, such as those sustained in an automobile accident which preceded the crime and are not aggravated by the crime, are not compensable, or it could mean that pre-existing mental conditions aggravated by a crime are not compensable. As both phrases are equally subject to competing reasonable interpretations, OAL concludes that the second challenged policy is a "regulation," which is invalid unless adopted pursuant to the APA.

I. DO THE COMPONENTS OF THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY *SPECIAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

In its response, the Department does not contend that any special exemption applies. OAL concurs. *No exemption applies to the "challenged sections" now, or at the time the request was filed.*

IV. DO THE COMPONENTS OF THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY *GENERAL* EXPRESS STATUTORY EXEMPTION FROM APA REQUIREMENTS?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.[36] Rules concerning certain specified activities of state agencies are not subject to the procedural requirements of the APA.[37]

INTERNAL MANAGEMENT

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

> "Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (b), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and *the rules necessary to properly consider the interests of all . . . under the statutes. . . .*" [Fn. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][38]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held the Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."[39]

The Board contends that its policy of requesting treatment records is one that only affects staff (and not victims or their treatment providers) in their claims processing because the Board is not required to disallow a claim if the records are not provided. However, it is clear that hospitals which provide inpatient mental health treatment are routinely being asked to submit treatment records for crime victims, and some claims are reduced due to pre-existing conditions. Therefore, the policy does not *only* affect agency staff.

In addition to applying to hospitals, the policy implicates the privacy rights of crime victims with regard to mental health treatment received prior to injury from a crime and the extent of compensation due to victims of crime and their treatment providers. Both are matters of serious consequence involving important public interests. Therefore, OAL concludes that the internal management exception does not apply to either component of the challenged Board policy.

RULES DIRECTED TO A SPECIFICALLY NAMED PERSON OR GROUP OF SPECIFICALLY NAMED PERSONS WHICH DO NOT APPLY GENERALLY THROUGHOUT THE STATE

The Board also contends that the challenged policies are exempt from the provisions of the APA because they are directed to a specifically named group of persons and do not apply generally throughout the state.[40] Such an exception is created by Section 11343(a)(3) of the Government Code. As mentioned earlier in this determination, both of the challenged Board policies do apply statewide. Therefore, this exception is not applicable.

OAL concludes that no general exemption applies here.

CONCLUSION

For the reasons set forth, OAL finds that:

(1) The policy which requires hospitals to submit records containing information regarding the clinical psychiatric histories of crime victims before consideration of requests for reimbursement for mental health treatment are considered is a "regulation." Therefore, it is without legal effect unless adopted pursuant to the APA.

(2) The policy which allows apportionment and denial of mental health treatment expenses based upon pre-existing mental health conditions is a "regulation," and is, likewise, invalid unless adopted pursuant to the APA.

DATE: November 4,1998

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ENDNOTES

1. This Request for Determination was filed on behalf of the Community Psychiatric Centers by Irving H. Perluss, 980 9th St., Suite 1900, P.O. Box 2469, Sacramento, CA 95812-2469. The State Board of Control was represented by Judith A. Kopec, Senior Staff Counsel, P.O. Box 48, Sacramento, CA 95812-0048, (916) 327-4016.

2. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *Chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

3. Government Code section 13900, Chapter 112, Statutes of 1945.

4. See Government Code sections 13901 and 13920.

5. See Government Code section 13959.

6. In 1994 section 19320 was amended to provide "The board may adopt regulations pursuant to Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3" governing claims against the state and other matters within its jurisdiction.

7. Government Code section 11342, subdivision (a).

8. See *Poschman v. Dumke* (1973) 31 Cal.App.3d 932,943; 107 Cal.Rptr. 596, 609.

9. Subsequently the legislature added the following clarifying language to Government Code section 13968, subdivision (a): All rules and regulations adopted pursuant to this subdivision shall be adopted in accordance with Chapter 3.5 (commencing with section 11340) of Part 1 of Division 3.

10. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5 cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107

Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 200, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997)57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

Tidewater itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer.*

11. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--1987 OAL Determination No. 10--was belatedly published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

12. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253.

13. Agency response, p.3.

14. Agency response, pp.4,7.

15. Agency response, p.7.

16. Agency response, p.5.

17. Section 649.14, Title 2, CCR.

18. Government Code section 13962, subdivision (b).

19. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

20. Agency response, p.4.

21. Agency response, p.6.

22. OAL received an extensive public comment from Ronald Carson Grimes in 1996. We have considered that comment in deciding whether the challenged policy exists and whether it constitutes a "regulation."

23. Government Code section 13960, subdivision (d).

24. Government Code section 13960, subdivision (d)(1).

25. Government Code section 13960, subdivision (d)(2).

26. This provision was renumbered in 1993 as subdivision (a)(7).

27. Government Code section 13962, subdivision (b).

28. Government code section 13965, subdivision (a).

29. Section 649.9(b)(1) and section 649.10, Title 2, CCR.

30. Section 649.9(b)(5), title 2, CCR.

31. Section 649.14, Title 2, CCR.

32. Request for determination, p.6.

33. *Id.*, at 436; 268 Cal.Rptr., at 254.

34. OAL Determination No. 15 [Docket No. 89-002] Oct. 10, 1989.

35. 1986 OAL Determination No. 4 (State Board of Equalization, June 25, 1986, Docket No. 85-005) California Administrative Notice Register 86, No. 28-Z, July 11, 1986, p. B-15, typewritten version, p. 12.

36. Government Code section 11346.

37. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

    a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)

    b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec.11342, subd. (g).)

c. Rules that "[establish] or [fix], *rates, prices, or tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342. subd. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, pp. 175-177. Like *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, **1990 OAL Determination No. 6** (Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), California Regulatory Notice Register 90, No. 13-Z, March 30, 1990, p. 496, rejected the idea that *City of San Joaquin* (cited above) was still good law.

38. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, n. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)

39. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

40. Agency response, p.8.